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Supreme Court, U.S.
FILED
(1)
07-767 DEC 7 - 2007

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No. 07-____

In the Supreme Court of the United States

JAMES D. ALJIAN, KIRK KERKORIAN, AND TRACINDA CORPORATION,
Petitioners,

v.

DONALD JOHNSON, Individually and on Behalf of All Others Similarly Situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 7, 2007

QUESTION PRESENTED

Whether an insider trading claim under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), that is dismissed as time-barred may nonetheless serve as the sole predicate violation to support identical, derivative insider trading claims under Section 20A of the Exchange Act, 15 U.S.C. § 78t-1.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The named parties to this proceeding are the same as the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit: petitioners James D. Aljian, Kirk Kerkorian and Tracinda Corporation; and respondent Glenn Rumsey, individually and on behalf of all others similarly situated. Mr. Aljian passed away during the pendency of the proceedings on April 12, 2007, and a suggestion of death on the record has been filed with the United States District Court for the Central District of California by McDermott Will & Emery LLP.

Pursuant to Supreme Court Rule 29.6, petitioner Tracinda Corporation states that it has no parent corporation and that no publicly held company owns 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 490 F.3d 778 and is reprinted in the Appendix at App. A, pp. 1-19. The opinion of the United States District Court for the Central District of California is reported at 394 F. Supp. 2d 1184 and is reprinted in the Appendix at App. B, pp. 20-64.

JURISDICTION

The Ninth Circuit issued its decision on June 20, 2007, and denied petitioners' timely filed petition for rehearing and rehearing *en banc* on August 9, 2007. App. C, p. 65. On October 30, 2007, Justice Kennedy granted petitioners' application to extend the time to file a petition for writ of certiorari to December 7, 2007. Supreme Court Docket No. 07A368. The jurisdiction of the court of appeals was based on 28 U.S.C. § 1292(b). This Court may exercise jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REPOSE PERIODS INVOLVED

Section 10(b) of the Exchange Act provides, in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange—
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Section 20A of the Exchange Act, App. D, pp. 66-68, creates a derivative cause of action, which provides, in pertinent part:

> *(a) Private rights of action based on contemporaneous trading*
>
> Any person who violates any provision of [the Exchange Act] or the rules or regulations thereunder by purchasing

> or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

15 U.S.C. § 78t-1(a).

Section 10(b) has the following limitations and repose periods, as originally established by this Court:

> Litigation instituted pursuant to § 10(b) and Rule 10b-5 ... must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation.

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991), *superseded in part by statute*, 15 U.S.C. § 78aa-1(a).

Section 20A has an outside limitations period of five years:

> No action may be brought under this section [Section 20A] more than 5 years

> after the date of the last transaction that is the subject of the violation.

15 U.S.C. § 78t-1(b)(4). Section 20A has no express discovery-based limitations period.

STATEMENT

I. Purpose and Background of the Statutes at Issue

Congress enacted the Exchange Act, 15 U.S.C. § 78a *et seq.*, to "provide for regulation and control" of transactions conducted "upon securities exchanges and over-the-counter markets" and "to insure the maintenance of fair and honest markets in such transactions." 15 U.S.C. § 78b. Courts have read Section 10(b) of the Exchange Act to create a private right of action for parties injured by deceptive practices in the purchase or sale of securities instruments. *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975).

In 1988, Congress added Section 20A to the Exchange Act, which provided a remedy for persons who trade contemporaneously with such unlawful transactions. Congress enacted Section 20A, in part, because many courts at the time, but not now, had construed the private right of action under Section 10(b) as limited to parties in privity with the insider whose trades are at issue. *See, e.g., Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 16 (2d Cir. 1983). Congress intended Section 20A to bypass these cases and allow contemporaneous traders a cause of action for an insider's violation of Section 10(b) and other

provisions of the Exchange Act.[1] *See* H.R. Rep. No. 100-910, at 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6063.

Section 20A provides that any person who "violates" any provision of the Exchange Act by engaging in insider trading shall be liable to any person who contemporaneously traded securities of the same class. *See* 15 U.S.C. § 78t-1(a). Claims under Section 20A are entirely derivative in nature; they must be based on a violation of a different section of the Exchange Act. *See, e.g., Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 703 (2d Cir. 1994) ("[T]o state a claim under § 20A, a plaintiff must plead a predicate violation of the [Exchange] Act or its rules and regulations.").

Section 20A contains an outside limitations period of five years. *See* 15 U.S.C. § 78t-1(b)(4). At the time Section 20A was enacted, however, the judicially created right of action under Section 10(b) did not have a uniform limitations period, and courts applied analogous statutes of limitations under state law for Section 10(b) claims. Thus, the applicable limitations period for Section 10(b) claims ranged

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[1] This legislative rationale for Section 20A disappeared nine years later when this Court held that the private right of action under Section 10(b) does not require privity. *United States v. O'Hagan*, 521 U.S. 642, 665-66, 666 n.11 (1997).

anywhere from one year to ten years for the same type of claim, depending on the jurisdiction.[2]

This disparity in the applicable limitations period for Section 10(b) claims ended when this Court held in *Lampf* that the limitations period for the judicially created private right of action under Section 10(b) is one year after the discovery of the facts constituting the violation and within three years after such violation, as with other remedial provisions of the Exchange Act. 501 U.S. at 364. The three-year period operates as a statute of repose, establishing an outer limit for the assertion of a Section 10(b) claim, regardless of when the

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[2] *See, e.g., Gray v. First Winthrop Corp.*, 82 F.3d 877, 880-81 (9th Cir. 1996) (applying California's three-year statute of limitations for fraud); *In re Integrated Res. Real Estate Ltd. P'ships Sec. Litig.*, 815 F. Supp. 620, 652-56 (S.D.N.Y. 1993) (tracing limitation periods that would apply in various circuits and states to plaintiffs' Section 10(b) claims); *Boyd v. Merrill Lynch, Pierce, Fenner & Smith*, 611 F. Supp. 218, 220 (S.D. Fla. 1985) (applying Florida's two-year/five-year statute to Section 10(b) claim). *See also* Richard L. Jacobson, *Shining a Lampf on Section 10(b) Limitations Periods*, 5 No. 11 Insights 12, 12 (November 1991) (citing *O'Hara v. Kovens*, 625 F.2d 15, 18 (4th Cir. 1980) (imposing a one-year limitations period); *Denny v. Performance Sys., Inc.*, [1971-72 Transfer Binder] Fed. Sec. L. Rep. 1124 (CCH) ¶ 93,387, at 91,891 (M.D. Tenn. 1971) (imposing a ten-year limitations period)).

plaintiff knew or should have known the facts giving rise to the claim.[3] *Id.* at 360.

II. Background of the Action

This putative (*i.e.*, as yet uncertified) securities class action was filed in 2003, more than four years after the alleged conduct, on behalf of purchasers of the common stock of DaimlerChrysler AG ("DaimlerChrysler") on certain dates in 1999. Respondent alleged that petitioners Tracinda Corporation ("Tracinda"), Kirk Kerkorian, the sole shareholder of Tracinda, and James Aljian, once an executive of Tracinda who served on DaimlerChrysler's Shareholders Committee, engaged in insider trading, and asserted causes of action under Sections 10(b) and 20A for insider trading, and under Section 20(a) for control person liability. The same alleged facts formed the basis for respondent's claims under both Sections 10(b) and 20A. As explained herein, because a Section 20A claim is entirely derivative in nature, respondent's claim under Section 20A was wholly dependent on the existence of a claim under Section 10(b).

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[3] In 2002, Congress enacted the Public Company Accounting Reform and Investor Act of 2002 ("Sarbanes Oxley"), Pub. L. 107-204, 116 Stat. 745, which changed the operative statute of limitations for private Section 10(b) actions commenced on or after July 30, 2002, to two years after discovery of the facts constituting the violation, with a five-year repose period from the date of the violation. 28 U.S.C. § 1658(b). As discussed herein, this change does not affect this case or the question upon which certiorari is sought.

III. The District Court Ruling

Petitioners moved to dismiss respondent's claims on various grounds, including the limitations bar applicable to the sole alleged predicate violation. By order dated July 30, 2004, App. B, pp. 20-64, the district court dismissed plaintiff's claims under Sections 10(b) and 20(a), finding that they were barred by the three-year statute of repose applicable to such claims under *Lampf*. App. B, pp. 26, 38.

The district court, however, did not dismiss respondent's Section 20A claims, stating that such claims were not barred "simply because the predicate claim upon which [they are] based is time barred." App. B, p. 44. The district court held that respondent "must plead and prove the predicate claim in order to prevail on his § 20A claim, but the longer limitations period of § 20A permits him to attempt to do so." App. B, p. 44.

IV. The Ninth Circuit Ruling

On interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the Ninth Circuit affirmed the district court. In its decision, the court of appeals noted that "[c]laims under Section 20A are derivative and therefore require an independent violation of the Exchange Act." App. A, p. 9. The court of appeals held, however, that the "plain meaning of the term 'violates'" as used in Section 20A "does not require that the predicate claim be filed within its own period of limitations." App. A, p. 14. Specifically, the Ninth Circuit reasoned that the applicable limitations period is not an element of an offense

that constitutes a "violation" of Section 10(b), App. A, pp. 10-11 n.13, and, in so doing, disparaged as "archaic" a long line of authorities holding that the applicable limitations period is an element of a violation under securities laws, App. A, p. 11-13 n.13.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Decision Conflicts with the Decisions of Other Circuits and of This Court Regarding the Effects and Purposes of Statutes of Limitations and Repose Periods.

A. The Ninth Circuit Decision Discards the Rule Followed by Other Courts that Treats Statutes of Limitations as Barring Liability, Not Just Remedies.

For more than 120 years, the integral nature of a statute of limitations to liability from a cause of action has been recognized by this Court. In *The Harrisburg*, 119 U.S. 199 (1886), *overruled on other grounds by Moragne v. States Marine Lines*, 398 U.S. 375 (1970), a decision relating to state wrongful death statutes brought under maritime jurisdiction in federal court, this Court stated:

> The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. *The time within which the suit must be brought operates as a limitation of the liability itself as*

> *created, and not of the remedy alone.* It is a condition attached to the right to sue at all.... Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.

Id. at 214 (emphasis added). *See also Rice v. United States*, 122 U.S. 611, 621-22 (1887) (if the statute of limitations has run on a claim, the "claim must be considered in law as actually paid and extinguished"). This principle has been applied to the federal securities laws, specifically to claims barred by the one-year discovery/three-year repose periods contained in Section 13 of the Securities Act of 1933 ("Securities Act") and by analogy to claims barred by the limitations period applicable to causes of action premised on Section 10(b) of the Exchange Act. *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978) (citing principle in holding that burden of showing compliance with limitations period rests with plaintiff). *See also Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1302 (4th Cir. 1993); *Byelick v. Vivadelli*, 79 F. Supp. 2d 610, 618-19 (E.D. Va. 1999); *Finne v. Dain Bosworth Inc.*, 648 F. Supp. 337, 340-41 (D. Minn. 1986); *Ingenito v. Bermec Corp.*, 441 F. Supp. 525, 552 (S.D.N.Y. 1977); *Kroungold v. Triester*, 407 F. Supp. 414, 419 (E.D. Pa. 1975).

Although the Ninth Circuit acknowledged that it has applied this rule in connection with claims

under Section 12 of the Securities Act in *Toombs v. Leone*, 777 F.2d 465 (9th Cir. 1985), it noted criticism from the Seventh Circuit that the rule has persisted "by blind inertia" and that "[i]t is time that it was discarded." App. A, p. 11 n.13 (quoting *Tregenza v. Great Am. Commc'ns Co.*, 12 F.3d 717, 719 (7th Cir. 1993)). Simultaneously, however, the Ninth Circuit suggested that the rule still applied in its circuit with respect to Section 12(2), but not with respect to Section 10(b) claims because no express limitations period is contained in that statute. App. A, p. 12 n.13. This reasoning not only creates inconsistency in the law between circuits, but also constitutes a distinction without a difference.

First, the Ninth Circuit's reasoning ignores the fact that there could not have been an express statute of limitations under the circumstances because the private right of action under Section 10(b) itself was judicially created. *See Lampf,* 501 U.S. at 358-59 (discussing history of private right of action under Section 10(b)). Consequently, after years of courts borrowing from analogous state statutes, this Court ultimately adopted the one-year discovery/three-year repose periods of Section 9(e) of the Exchange Act as the uniform statute of limitations to be applied to such claims. *Id.* at 359-60, 364.

Second, by being judicially created, neither the claim nor the limitations period attached to it becomes any less significant, valid or enforceable than if they had been imposed by Congress. In point of fact, Congress has acknowledged the validity of this cause of action and associated limitations

periods by *statute* in 15 U.S.C. § 78aa-1(a) and 28 U.S.C. § 1658(b). Therefore, the Ninth Circuit's reasoning that the pleading rule "is inapplicable to Section 10(b) because, at least in this case, that statute creates no express period of limitations" rests on a faulty premise. *See* App. A, p. 18.

Third, the Ninth Circuit's decision directly conflicts with the Second Circuit's decision in *Jackson National Life Insurance Co. v. Merrill Lynch & Co.*, which holds that a claim barred by a statute of repose cannot serve as a predicate to a Section 20A claim. *See* 32 F.3d at 704. The Second Circuit noted that allowing plaintiffs to rely upon Section 20A to revive time-barred claims would undermine the absolute nature of the statutes of repose governing such claims:

> The three-year [repose period governing the predicate claim] is an absolute limitation which applied whether or not the investor could have discovered the violation. For us to accept Jackson National's argument would put us in conflict with Congress's evident intent not to permit ... liability to extend beyond the three-year horizon.

Id. (internal citations omitted). The Second Circuit explicitly rejected the argument that a Section 20A

action could be based upon a time-barred claim – the very argument accepted by the Ninth Circuit below.[4]

B. Decisions of This Court Have Identified the Limitations Period as an Element of Section 10(b) Claims.

This Court has emphasized the integral nature of the limitations period to the liability scheme under a Section 10(b) claim in *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 508 U.S. 286 (1993). In delivering the opinion of the Court, Justice Kennedy wrote that because Congress had "made no attempt to define the precise contours of the private cause of action under § 10(b), Congress had no occasion to address how to limit, compute, or allocate liability arising from it." *Id.* at 295. In this regard, the opinion stated that the Court had specified "elements or aspects of the 10b-5 apparatus unique to a private liability arrangement, including a statute of limitations...." *Id.* The significance of the limitations period was echoed in the dissenting opinion written by Justice Thomas: "A limitations period is almost indispensable to a scheme of civil liability; even when federal law prescribes no express statute of limitations, we will not ordinarily assume that Congress intended no time limit." *Id.* at 301. This Court again characterized the statute of limitations as an "element" of "the 10b-5 private liability scheme" in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164,

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[4] To be sure, the claim at issue in *Jackson National* had further defects, as the alleged predicate violation did not arise under the Exchange Act and, therefore, could not serve as the basis for a Section 20A claim even if timely. 32 F.3d at 703-04.

172 (1994), *superseded in part by statute,* 15 U.S.C. § 78t(f).

The Ninth Circuit dismisses this Court's carefully chosen statements in *Musick* and *Central Bank* by pointing to the absence of any reference to the limitations period in the following language from *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005):

> "[i]n cases involving publicly traded securities and purchases or sales in public securities markets, the action's basic elements include: (1) a material misrepresentation (or omission), (2) scienter, i.e., a wrongful state of mind, (3) a connection with the purchase or sale of a security, (4) reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as 'transaction causation,' (5) economic loss, and (6) 'loss causation,' i.e., a causal connection between the material misrepresentation and the loss."

App. A, pp. 10-11 n.13 (quoting *Dura*, 544 U.S. at 341-42). However, the Ninth Circuit ignores the fact that this list of basic elements is expressly nonexclusive, as this Court used the term "include" rather than "are." Indeed, as the Court has affirmatively recognized, the limitations period is integral to claims under Section 10(b). Therefore, the failure to list it among the formal elements of the claim is of no consequence. Limitations periods are

crucial to countless causes of action, but rarely are listed in the law school recitations of the elements that are unique to those claims.

Even cases dealing with claims under the Securities Act do not make it a practice to include the limitations or repose periods when listing the elements of the claim. *See, e.g., In re Daou Sys. Inc. Sec. Litig.*, 411 F.3d 1006, 1027 (9th Cir. 2005) (explaining that a plaintiff bringing a Section 11 claim under the Securities Act must demonstrate "(1) that the registration statement contained an omission or misrepresentation, and (2) that the omission or misrepresentation was material," but omitting reference to the applicable statute of limitations); *West v. Innotrac Corp.*, 463 F. Supp. 2d 1169, 1173-74 (D. Nev. 2006) (breaking down Section 12(a)(2) of the Securities Act into four elements without reference to the applicable statute of limitations). Significantly, the Ninth Circuit overlooked this fact, including its own decision in *Daou*, as it found Securities Act claims were distinguishable from the Exchange Act and the situation herein because the limitations and repose periods of those claims traditionally have been incorporated into the elements necessary to liability. App. A, pp. 10-13 n.13.

C. The Ninth Circuit Decision Undermines the Purpose of Section 10(b)'s Repose Period.

More than a century and a half of public policy, backed by numerous decisions of this Court, underlies the establishment of repose periods. Here,

the Ninth Circuit decision evades Section 10(b)'s repose period, without explanation for its disregard of this Court's decisions on the subject. As this Court has stated time and time again, repose periods "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citing *United States v. Marion*, 404 U.S. 307, 322, n.14 (1971); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945); *Missouri K. & T. R. Co. v. Harriman*, 227 U.S. 657, 672 (1913); *Bell v. Morrison*, 1 Pet. 351, 360 (1828)).

Simply because the claim relates to insider trading does not undermine the application of this time-honored principle. Indeed, this Court's decision in *Lampf* expressly rejected the application of equitable tolling to Section 10(b) claims as inconsistent with the three-year repose period, even though insider trading claims were then – and still are – most often brought under Section 10(b):

> The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The 3-year limit is a period of repose inconsistent with tolling. One commentator explains: "[T]he inclusion of the three-year period can have no significance in this context other than to impose an outside limit."

> Bloomenthal, The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude, 60 U.Colo.L.Rev. 235, 288 (1989). See also ABA Committee on Federal Regulation of Securities, Report of the Task Force on Statute of Limitations for Implied Actions 645, 655 (1986) (advancing "the inescapable conclusion that Congress did not intend equitable tolling to apply in actions under the securities laws"). *Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period.*

Lampf, 501 U.S. at 363 (emphasis added).

The Ninth Circuit decision effectively eviscerates this holding by extending the liability premised on the Section 10(b) claim beyond that very three-year limit, simply by changing the title of the claim. Whether brought under Section 10(b) or Section 20A, the conduct at issue is the same. There is no reason provided by the Ninth Circuit or Congress for disparate treatment with respect to the Section 10(b) repose period.

II. The Ninth Circuit Decision Has the Effect of Eliminating the Requirement of an Independent Predicate Violation to Support a Claim under Section 20A and Conflicts with Decisions of Other Circuits.

A. The Ninth Circuit Holding Is Inconsistent with the Derivative Nature of Section 20A, which Requires an Actionable Independent Predicate Violation, and Is Inconsistent with the Ninth Circuit's Own Prior Ruling as Interpreted by Other Circuits.

A Section 20A claim to compensate those who purchased stock contemporaneously with inside traders is expressly dependent upon the existence of *liability* under another provision of the Exchange Act. 15 U.S.C. § 78t-1(a). As the Third Circuit explained in *In re Advanta Corp. Securities Litigation*, 180 F.3d 525 (3d Cir. 1999):

> Liability under section 20(A) is predicated upon an independent violation of "this chapter or the rules or regulations thereunder." [] Hence, claims under section 20(A) are derivative, requiring proof of a separate underlying violation of the Exchange Act. *See Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 703 (2d Cir. 1994) ("To state a claim under § 20A, a plaintiff must plead a predicate violation of the '34 Act or its rules and regulations."); *In re VeriFone Sec.*

> *Litig.*, 11 F.3d 865, 872 (9th Cir. 1993) (noting that if plaintiffs "have failed to allege an actionable independent underlying violation of the '34 Act, they similarly cannot maintain a claim under § 20A"). Because plaintiffs have failed to plead a predicate violation of Section 10(b) or Rule 10b-5, the section 20(A) claim must also be dismissed.

180 F.3d at 541.

While the Ninth Circuit decision acknowledges that "[c]laims under Section 20A are derivative and therefore require an independent violation of the Exchange Act,"[5] App. A, p. 9, its holding directly conflicts with these authorities by allowing a Section 20A claim to proceed where the Section 10(b) claim (the predicate claim) has been dismissed for failure to state a claim. It does so on the basis that the "violation" does not need to be actionable or viable. App. A, pp. 9-10. This holding is unsupported in law, and possibly undermines other circuit opinions, such as *Advanta*, which itself cited to the Ninth Circuit's language in *VeriFone* suggesting an "actionable independent underlying violation" is required.

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[5] Petitioners also questioned the ability of a plaintiff to use precisely the same conduct constituting the primary claim as the basis for the derivative Section 20A claim. However, the Ninth Circuit did not address this issue. By proceeding in this manner, respondent disregards the "separate" or "independent" predicate claim requirement, which is a substantive aspect of the claim. *See Advanta*, 180 F.3d at 541; *Jackson Nat'l*, 32 F.3d at 703; *VeriFone*, 11 F.3d at 872. For this reason alone, a writ of certiorari should issue.

The "liability" quotient is crucial. Indeed, earlier this year, the Fourth Circuit affirmed a district court ruling that dismissed the plaintiffs' derivative claims under Sections 20(a) (the Exchange Act's control person provision) and 20A "because these claims depended upon the liability alleged in the first count [Section 10(b)]." *Teachers' Ret. Sys. v. Hunter*, 477 F.3d 162, 169 (4th Cir. 2007). Significantly, there can be no liability if the claim is time-barred.

In contrast, the Ninth Circuit decision is based on its "belie[f] that the term 'violates' ordinarily is understood to mean that a person has satisfied the essential elements of the proscribed act regardless of whether an action is commenced within the applicable statute of limitations." App. A, pp. 10, 13. The Ninth Circuit decision's explanation of this belief discounts the rule set forth by this Court in *The Harrisburg* and this Court's identification of the limitations period as an "element" of a Section 10(b) claim and, as a consequence, is in conflict with decisions of this Court and other circuits. Significantly, this Court has stated that rules of finality "treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a

judgment on the merits."[6] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995).

B. The Ninth Circuit Decision Fails to Give Meaning to All Provisions of the Statute and to Its Legislative History.

In focusing only on the five-year outside limitations period within which a Section 20A action can be asserted and the assumed "plain meaning" of the term "violates," the Ninth Circuit decision renders meaningless the *independent* predicate violation requirement. In point of fact, the legislators made clear during the debate on Section 20A that nothing in the statute was intended to alter the substantive law on insider trading claims as it then existed. 134 Cong. Rec. H7470 (1988); 134 Cong. Rec. H7468 (1988). Yet, under the Ninth Circuit's interpretation, the statute would do just

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[6] This Court has recognized that a statute of limitations may be so fundamental to a claim that a court may lack jurisdiction to adjudicate that claim in whatever form once the statute of limitations has run. For example, in *Allen v. Siebert*, this Court observed that Pennsylvania's statute of limitations for post-conviction petitions challenging criminal convictions serves as a "jurisdictional time bar under state law." 128 S. Ct. 2, 3 (2007). This Court has concluded that under the federal habeas corpus statute, 28 U.S.C. §§ 2244 & 2254, "time limits ... go to the very initiation of a petition and a court's ability to consider that petition." *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). Therefore, a time-barred state post-conviction claim cannot serve as the predicate for a federal habeas claim.

that by eliminating the application of the limitations period of the underlying predicate claim.[7]

Surely, Congress did not intend for plaintiffs to sit idly by for five years if they had discovered facts constituting insider trading earlier. To the contrary, the five-year outside period in Section 20A contemplates that any shorter discovery period for the independent predicate violation would operate to bar the derivative claim under such circumstances. *See, e.g., In re Lawrence*, 293 F.3d 615, 620 (2d Cir. 2002) (citing to Section 20A's outside limitations period, a "claim under § 20A of the 1934 Act must be brought *both* within five years of fraud (i.e., sale) and one year of discovery or constructive discovery of fraud." (emphasis added)).

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[7] There was no uniform limitations period for Section 10(b) when Section 20A was enacted. When the Insider Trading and Securities Fraud Enforcement Act went into effect, in 1988, courts were borrowing widely varying limitations periods for Section 10(b) claims from analogous state statutes. Consequently, from the text of the statute and the context in which it was enacted, Congress appears to have been looking for an outside cutoff date for the Section 20A claim to prevent stale insider trading claims from being brought even if the local jurisdiction allowed a Section 10(b) claim to survive for a decade. In this regard, Section 20A expressly states that "[n]o action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation." 15 U.S.C. § 78t-1(b)(4). Significantly, there is no shorter discovery-based limitations period provided for in Section 20A, as has been established for other claims like violations of Section 10(b).

III. The Ninth Circuit Decision Will Continue to Impact Section 20A Cases Under the Discovery Period in Sarbanes-Oxley.

Although Sarbanes-Oxley extended the discovery and repose periods established by this Court in *Lampf*, making the new repose period five years, as under Section 20A, the conflicts created by the Ninth Circuit decision will continue to interfere with the adjudication of Section 10(b) and Section 20A claims on a going-forward basis. This is because Sarbanes-Oxley included a two-year discovery period as well. 28 U.S.C. § 1658(b). Therefore, if the independent predicate violation is deemed time-barred by the two-year discovery period, under the Ninth Circuit decision, a Section 20A claim nonetheless could be maintained as long as the claim is asserted within five-years of the alleged violation. The conflicts do not go away.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 7, 2007

APPENDIX

APPENDIX A
Opinion of the United States Court of Appeals for the Ninth Circuit (filed June 20, 2007)

DONALD JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-APPELLEE,

v.

JAMES D. ALJIAN; KIRK KERKORIAN; TRACINDA CORPORATION,
DEFENDANTS-APPELLANTS.

No. 04-56997.

United States Court of Appeals
for the Ninth Circuit

490 F.3d 778

Argued and Submitted January 8, 2007.
Filed June 20, 2007.

Eric Landau, McDermott Will & Emery LLP, Irvine, CA, argued the cause for defendants-appellants James D. Aljian, Kirk Kerkorian, and Tracinda Corporation; Shawn M. Harpen, McDermott Will & Emery LLP, Irvine, CA, and Terry Christensen and Eric P. Early, Christensen, Miller, Fink, Jacobs, Glasser, Weil & Shapiro, LLP, Los Angeles, CA, were on the brief.

Christopher L. Nelson, Schiffrin & Barroway, LLP, Radnor, PA, argued the cause for plaintiff-appellee Donald Johnson; Katharine M. Ryan, Schiffrin & Barroway, LLP, Radnor, PA, and Christopher Kim and Lisa J. Yang, Lim, Ruger & Kim, LLP, Los Angeles, CA, were on the brief.

Appeal from the United States District Court for the Central District of California; Florence-Marie Cooper, District Judge, Presiding. D.C. No. CV-03-05986-FMC.

Before: DIARMUID F. O'SCANNLAIN, ANDREW J. KLEINFELD, and MILAN D. SMITH, JR., Circuit Judges.

O'SCANNLAIN, Circuit Judge.

We must decide a case of first impression involving insider trading liability under the federal securities laws.

I

On August 21, 2003, Donald Johnson,[1] on behalf of himself and all other persons who purchased the common stock of DaimlerChrysler AG ("DaimlerChrysler") on nine different dates between

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[1] Although Johnson is the named plaintiff in this case, the district court appointed Glenn Rumsey to be the lead plaintiff on November 20, 2003. We refer to the plaintiff-appellee as "Johnson."

March 19, 1999, and June 11, 1999, brought this as-yet-uncertified securities fraud class action against James D. Aljian, Kirk Kerkorian, and Tracinda Corporation.[2] Kerkorian is an executive and sole shareholder of Tracinda.[3] Aljian is an executive of Tracinda and a member of the DaimlerChrysler Shareholder Committee.

The amended complaint[4] alleges (1) illegal insider trading against all defendants in violation of Section 10(b)[5] of the Exchange Act of 1934

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[2] We refer collectively to defendants-appellants Aljian, Kerkorian, and Tracinda as the "defendants."

[3] "In determining whether the complaint states a claim upon which relief could be granted, we assume the facts alleged in the complaint to be true." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 998 (9th Cir. 2002).

[4] The amended complaint was filed on January 23, 2004, and states substantially similar allegations of insider trading and the same causes of action as the initial complaint filed on August 21, 2003.

[5] Section 10(b) makes it "unlawful for any person .... [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities Exchange] Commission may prescribe." Exchange Act § 10(b), 15 U.S.C. § 78j(b).

("Exchange Act"), and Rules 10b-5[6] and 10b5-1[7] promulgated thereunder; (2) control person liability against Aljian and Kerkorian based on Section 20(a)[8] of the Exchange Act; and (3) contemporaneous trading liability against all defendants based on Section 20A of the Exchange Act.[9]

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[6] Rule 10b-5 makes it "unlawful for any person ... [t]o employ any device, scheme, or artifice to defraud .... in connection with the purchase or sale of any security." Rule 10b-5, 17 C.F.R. § 240.10b-5.

[7] Rule 10b5-1 "defines when a purchase or sale constitutes trading 'on the basis of' material nonpublic information in insider trading cases brought under Section 10(b) of the Act and Rule 10b-5 thereunder." Rule 10b5-1, 17 C.F.R. § 240.10b5-1.

[8] Section 20(a) provides in relevant part that "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable." Exchange Act § 20(a), 15 U.S.C. § 78t(a).

[9] Specifically, the amended complaint asserts a claim against Tracinda and Kerkorian based on Section 20A(a), which imposes liability on persons who engage in insider trading for damages suffered by individuals who trade contemporaneously with the insider. Exchange Act § 20A(a), 15 U.S.C. § 78t-1(a). The first amended complaint also asserts a

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The amended complaint alleges that Aljian attended a DaimlerChrysler Shareholder Committee Meeting, where he was given a board report entitled "DaimlerChrysler Operative Planning 1999-2001" and marked "strictly confidential." The report projected a "significant" decline in free cash flows. The amended complaint further claims that Aljian placed the report in Tracinda's central files, which were readily accessible to Kerkorian. The amended complaint does not allege that Aljian informed Kerkorian of the projected decline in free cash flows, but alleges that he knew that Kerkorkian had unrestricted access to the report.

The amended complaint also alleges that, with the benefit of such insider information, Tracinda sold approximately 7.6 million shares of DaimlerChrysler stock between March 19, 1999, and June 11, 1999. Finally, the amended complaint alleges that when DaimlerChrysler announced a decline in cash flows in July 1999, the price of its shares dropped.

The defendants filed a motion to dismiss, arguing that (1) the claims for violation of Sections 10(b) and 20(a) were time-barred; (2) the amended complaint lacked the particularity required by

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claim against Aljian based on Section 20A(c), which imposes joint and several liability on tippers. Exchange Act § 20A(c), 15 U.S.C. § 78t-1(c).

Fed.R.Civ.P. 9(b) and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4; (3) the amended complaint failed to establish the elements of insider trading, including scienter, materiality, loss causation, undisclosed "inside" information; and (4) the claim under Section 20A could not survive dismissal of the Section 10(b) claim, which served as the sole predicate violation. The district court granted the motion to dismiss with prejudice the Sections 10(b) and 20(a) claims as barred by the applicable statute of limitations, but denied the motion to dismiss the Section 20A claim. *Johnson v. Aljian*, 394 F.Supp.2d 1184, 1203 (C.D.Cal. 2004).

The district court certified the issue involving the Section 20A claim for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we granted the defendants' petition for permission to appeal.

II

The defendants argue on appeal that the district court erred by not dismissing the Section 20A claim. The defendants contend that Section 20A requires an *actionable*[10] predicate violation of the Exchange Act. Although the Section 20A claim was timely filed under its own period of limitations, the Section 10(b) claim—the sole predicate violation of

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[10] By "actionable," we simply mean that the predicate violation must not be time-barred under its own period of limitations.

the Exchange Act in this case—was not independently actionable because the claim has been dismissed as time-barred under its separate period of limitations. Therefore, the defendants urge, the district court should have also dismissed the Section 20A claim.

A

Our analysis must begin with the statutory language. *United States v. TRW Rifle 7.62X51mm Caliber*, 447 F.3d 686, 689 (9th Cir. 2006). When interpreting Section 20A, we must give words their ordinary or plain meaning. *Id.* "[W]e follow the common practice of consulting dictionary definitions to clarify their ordinary meaning[ ] and look to how the terms were defined at the time [the statute] was adopted." *Id.* (internal quotation marks omitted) (alterations in original). We also recognize the "cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Wash. Market Co. v. Hoffman*, 101 U.S. 112, 115, 25 L.Ed. 782 (1879). But interpreting a statute "is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). We therefore look not only to the "language itself, [but also to] the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997).

B

Section 20A provides a cause of action against "[a]ny person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information." Exchange Act § 20A(a).[11] Section 20A also includes an express statute of limitations,[12] which provides that "[n]o

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[11] Because Section 20A(a) and (c) both require a predicate violation of the Exchange Act, or the rules promulgated thereunder, our analysis applies equally to both subsections.

[12] "Although the distinction between statutes of limitations and statutes of repose is often blurred, statutes of limitations differ from statutes of repose because the former 'bars plaintiff[s] from bringing an already accrued claim after a specified period of time,' whereas the latter 'terminates a right of action after a specific time, even if the injury has not yet occurred.' " *Fields v. Legacy Health Sys.*, 413 F.3d 943, 952 n. 7 (9th Cir. 2005) (citation omitted) (alteration in original). There is some disagreement whether Section 20A's five-year period of limitations is a statute of repose or a statute of limitations. *See Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990) ("Section 20A, by contrast, appears to be an ordinary statute of limitations. The SEC believes that it is a statute of repose as well as a statute of limitations, but it is not so clear to us. The language is in the traditional form of a statute of limitations, and the Solicitor General did not cite

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action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation." Exchange Act § 20A(b)(4).

The term "violates" in Section 20A is crucial. Claims under Section 20A are derivative and therefore require an independent violation of the Exchange Act. *See Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1035 n. 15 (9th Cir. 2002); *see also In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 541 (3d Cir. 1999); *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 703 (2d Cir. 1994); *In re VeriFone Sec. Litig.*, 11 F.3d 865, 872 (9th Cir.1993). The defendants claim that "the statute is clear: a viable predicate violation is required." But the defendants seek to introduce an additional requirement into the text. Nowhere do we find in the statute such modifying or restricting terms as "viable," "actionable," or "timely."

Webster's Third New International Dictionary, the edition in print when Congress enacted Section 20A in 1988, defines the verb "violates" to mean breaking or disregarding the law. Webster's Third

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any legislative history indicating that it is more potent than the usual variety."(citation omitted)). Because we do not believe our conclusion depends on this distinction and because Section 20A titles the provision "Statute of limitations," we will refer to Section 20A's period of limitations as a "statute of limitations" without deciding the matter.

New Int'l Dictionary 2554 (3d ed.1986); *see also* Black's Law Dictionary 1408 (5th ed.1979) (defining "violation" to mean "[i]njury; infringement; breach of right, duty, or law"). When, for example, someone asks if a person "violated" the speeding law, she is ordinarily understood as inquiring whether that person disregarded the posted speed limit, not whether a timely action commenced or a successful prosecution resulted. We believe that the term "violates" ordinarily is understood to mean that a person has satisfied the essential elements[13] of the

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[13] The defendants contend that the statute of limitations is an element of Section 10(b), citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), and *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 508 U.S. 286, 295, 113 S.Ct. 2085, 124 L.Ed.2d 194 (1993). But in those cases the Court simply refers to the statute of limitations as a general dimension of Section 10(b), not an essential element of the claim. Indeed, the Court recently explained in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) , that "[i]n cases involving publicly traded securities and purchases or sales in public securities markets, the action's basic elements include: (1) a material misrepresentation (or omission), (2) scienter, i.e., a wrongful state of mind, (3) a connection with the purchase or sale of a security, (4) reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as 'transaction causation,' (5) economic loss, and (6) 'loss causation,'

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i.e., a causal connection between the material misrepresentation and the loss." *Id.* at 341-42, 125 S.Ct. 1627 (citations omitted). The defendants' argument that the statute of limitations is an element of Section 10(b) fails.

Nor do we believe that the statute of limitations becomes transformed as an element of such a claim pursuant to the archaic rule " 'that, when the very statute which creates the cause of action also contains a limitation period, the statute of limitations not only bars the remedy but also destroys the liability, and therefore the plaintiff must plead and prove facts showing that he is within the statute.' " *Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978) (quoting 3 Louis Loss, Securities Regulation 1742 (2d ed.1961)). We followed such general rule in *Toombs v. Leone*, 777 F.2d 465 (9th Cir. 1985), holding that "the plaintiff must affirmatively plead sufficient facts in his complaint to demonstrate conformity with the statute of limitations" if he is to make out a violation of Section 12 of the Securities Act of 1933. *Id.* at 468 .

This rule has incurred forceful, and we think justified, criticism. In *Tregenza v. Great American Communications Co.*, 12 F.3d 717 (7th Cir. 1993), the Seventh Circuit stated that "[t]o the extent that the rule has persisted, it has done so by blind inertia" and that "[i]t is time that it was discarded." *Id.* at 719. Pursuant to Fed.R.Civ.P. 8(c) , the statute of limitations is an affirmative defense. We recognize, however, that the Private Securities

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Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 , may require a plaintiff to plead certain facts with particularity, which may establish that the action is time-barred. But the Supreme Court recently explained in *Jones v. Bock*, --- U.S. ----, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007) , that even though "the complaint is subject to dismissal for failure to state a claim" because the "allegations ... show that relief is barred by the applicable statute of limitations, ... that does not make the statute of limitations any less an affirmative defense." *Id.* at 920.

Notwithstanding that such a disapproved pleading rule may survive in this circuit with respect to Section 12, we are convinced that it is inapplicable to Section 10(b) because, at least in this case, that statute creates no express period of limitations. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991) (creating a uniform statute of limitations for an implied cause of action under Section 10(b) because that statute failed to provide an express period of limitations), superseded in part by statute, 28 U.S.C. § 1658(b); *see also Tregenza*, 12 F.3d at 719 (rejecting the argument that a statutorily mandated statute of limitations "is an element of the claim itself" because such argument is "a conclusion rather than an explanation, and an especially dubious one where as in this case the statute of limitations isn't even found in the statute that creates the substantive right"). In any event, we remain

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proscribed act regardless of whether an action is commenced within the applicable statute of limitations or whether a traffic citation was issued. Indeed, we have employed this common understanding of the term with respect to an action under Section 10(b), the predicate violation in this case. For example, in *Ambassador Hotel Co., Ltd. v. Wei-Chuan Investment*, 189 F.3d 1017 (9th Cir. 1999), we explained:

> [T]o prove *violation* of either Section 10(b) or Rule 10b-5, the private plaintiff must demonstrate that the alleged fraud occurred "in connection with the purchase or sale of a security". Once this foundational requirement has been met, the plaintiff must prove five elements: 1. misrepresentation (or omission, where there exists some duty to disclose); 2. materiality; 3. scienter (intent to defraud or deceive); 4. reliance; and 5. causation. The plaintiff must prove both actual cause ("transaction causation") and proximate cause ("loss causation").

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unpersuaded that the statute of limitations is an element of Section 10(b).

Id. at 1025 (citations omitted) (emphasis added).[14] Accordingly, we are persuaded that the plain meaning of the term "violates" does not require that the predicate claim be filed within its own period of limitations.

That the predicate violation need not itself be actionable is further supported by the statutory language of other provisions of the Exchange Act. In particular, the statute of limitations applicable to Section 10(b), the predicate violation in this case, measures the period of limitations in relation to the "violation." A Section 10(b) claim "must be commenced within one year after the discovery of the facts constituting the *violation* and within three years after such *violation.* " *Lampf*, 501 U.S. at 364, 111 S.Ct. 2773 (emphasis added), *superseded in part by statute*, 28 U.S.C. § 1658(b) ("[A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws ... may be brought not later than the earlier of— (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."); *see also* Exchange Act § 9, 15 U.S.C. § 78i(e) ("No action shall be maintained to enforce any liability created under this section, unless

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[14] *See also, e.g., United States v. Smith*, 155 F.3d 1051, 1063 (9th Cir. 1998) ("A violation of Rule 10b-5 comprises four elements: a (1) misleading (2) statement or omission (3) of a 'material' fact (4) made with scienter." (emphasis added)).

brought within one year after the discovery of the facts constituting the violation and within three years after such violation."). Because the period of limitations is measured from the point of violation, it challenges common sense to conclude that a person only "violates" Section 10(b) if an action is commenced within that period.

Finally, the defendants' interpretation effectively treats Section 20A's own five-year statute of limitations under the present statutory scheme "as surplusage—as words of no consequence." *Ratzlaf v. United States*, 510 U.S. 135, 140, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994). We know of no possible predicate violation, and the defendants cite none, with a limitations period that is longer than Section 20A's five-year period. Thus, accepting the defendants' interpretation would effectively render Section 20A's express statute of limitations meaningless because the underlying predicate violation's statute of limitations would always dictate the period of limitations for a Section 20A action under the present statutory scheme.[15] Only if

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[15] At the time Congress enacted Section 20A in 1988, Section 10(b) contained no uniform period of limitations. Courts borrowed the period of limitations for Section 10(b) from the most analogous state cause of action before the Supreme Court adopted a uniform period of limitations in 1991. *Lampf*, 501 U.S. at 355, 364, 111 S.Ct. 2773. Under the previous borrowing scheme, the defendants' interpretation of Section 20A would not render the express statute of limitations

(continued...)

Section 20A is independently governed by its own statute of limitations will that provision retain meaning.

C

The defendants raise two additional arguments that require our attention.

1

Relying on *Jackson National Life Insurance Co. v. Merrill Lynch & Co.*, 32 F.3d 697, the defendants contend that the Second Circuit interpreted Section 20A contrary to our analysis in this case. The defendants read too much into *Jackson National*. There, the court held that Section 20A of the Exchange Act entails a predicate violation of the Exchange Act in the context of rejecting an attempt to base a Section 20A claim on violations of Sections 11 and 12(2) of the Securities Act of 1933. *Id.* at 704. But this conclusion necessarily followed from Section 20A's express requirement of a violation "of

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meaningless because a Section 20A claim could be time-barred under its own five-year statute of limitations, but the underlying Section 10(b) claim could be actionable under the applicable state statute of limitations. Nevertheless, as discussed above, nothing in the statutory language evidences Congress's intent that Section 20A claims be time-barred whenever the predicate violation is time-barred.

this chapter or the rules or regulations thereunder." Exchange Act § 20A(a) (emphasis added). The reference to "this chapter" is to the Exchange Act, not the Securities Act of 1933. *Jackson Nat'l*, 32 F.3d at 703.

The Second Circuit also explained that the statute of limitations applicable to Sections 11 and 12(2), "after setting out the one-year 'inquiry notice' period," imposes a three-year absolute period of limitations on claims premised under those sections. *Id.* at 704 (citing 15 U.S.C. § 77m). The court explained that "Congress added § 20A ... to remedy the very specific problems inherent in prosecuting insider trading cases" and "the five-year limitations period recognizes the difficulties of ferreting out evidence sufficient to prosecute insider trading cases." *Id.* at 703 (internal quotation marks omitted). The court reasoned that "[b]ecause the difficulties of pleading and proving scienter and the other elements of a Rule 10b-5 action do not similarly impede claims under §§ 11 and 12(2) of the 33 Act, it would skew the legislative balance of interests to apply § 20A's five year limitations period to the lower threshold of liability applicable to the initial distribution of securities under the 33 Act." *Id.* at 704. Accordingly, the court concluded that allowing a Section 20A claim based on a violation of Sections 11 or 12(2) of the Securities Act of 1933 "would put us in conflict with Congress's evident intent not to permit underwriter and issuer liability to extend beyond the three-year horizon." *Id.* The defendants claim that this is significant because Section 10(b), the predicate violation in this

case, contains a similar three-year period of limitations. We are unpersuaded. First, as the district court recognized, "[u]nlike the claims presented in Jackson, the claims asserted in this action implicate the problems inherent in advancing insider trading claims." *Johnson*, 394 F.Supp.2d at 1195. Moreover, our interpretation presents no threat to Congress's evident intent or the legislative balance of interests because Section 10(b) is a cause of action created by the courts and, at least in this case, operates under a court-imposed period of limitations.

Accordingly, our interpretation of Section 20A is not contrary to the Second Circuit's well-reasoned decision in *Jackson National*.

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The defendants' reliance on *In re VeriFone Securities Litigation*, 11 F.3d 865, is also misplaced. The defendants argue that in *VeriFone* we "acknowledged that if plaintiffs 'have failed to allege an actionable independent underlying violation of the [Exchange Act], they similarly cannot maintain a claim under § 20A.' " But we only acknowledged that the plaintiffs in that case conceded this point. *Id.* at 872 ("Shareholders *concede* that if they have failed to allege an actionable independent underlying violation of the [Exchange Act], they similarly cannot maintain a claim under § 20A. Accordingly, in light of our conclusion that no violation of the [Exchange Act] has been stated, the § 20A claim was properly dismissed." (emphasis

added)). Moreover, in *VeriFone* the predicate violation collapsed because the plaintiffs failed to establish a material omission, an essential element of a Section 10(b) violation. *Id.* at 871. Our interpretation does not disturb the established requirement that the plaintiff plead and prove the essential elements of the predicate violation to maintain an action under Section 20A.

III

In sum, we conclude that to maintain a claim under Section 20A, a plaintiff need not plead an actionable predicate violation. Accordingly, the district court did not err in denying the defendants' motion to dismiss the Section 20A claim.

AFFIRMED.

APPENDIX B
Opinion of the United States District Court for the Central District of California (filed July 30, 2004)

DONALD JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,
v.
JAMES D. ALJIAN, KIRK KERKORIAN, AND TRACINDA CORPORATION, DEFENDANTS.

NO. 03-5986 FMC (PJWX).

United States District Court
for the Central District of California

394 F.Supp.2d 1184

JULY 30, 2004.

For Plaintiff: Christopher Kim, Lisa J. Yang, Lim Ruger & Kim, Los Angeles, CA, Christopher L. Nelson, Jacob A. Goldberg, Marc A. Topaz, Richard A. Maniskas, Schiffrin & Barroway, Bala Cynwyd, PA, Douglas M. Leavitt, Danziger Shapiro & Leavitt, Philadelphia, PA.
For Defendants: Eric N. Landau , Kristel Adriane Massey, Shawn M. Harpen, McDermott Will & Emery, Irvine, CA, Eric Peter Early, Terry N. Christensen, Timothy Yuchi Sung, Christensen Miller Fink Jacobs Glaser Weil & Shapiro, Los Angeles, CA.

COOPER, District Judge.

This matter is before the Court on Defendants' Motions to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and 9(b) (docket # 18, 20). This matter was heard on July 12, 2004, at which time the parties were in receipt of the Court's tentative Order. After oral argument, the Court took the matter under submission. For the reasons set forth below, the Court **hereby grants in part and denies in part** Defendants' Motions to Dismiss.

I. Background

A. Nature of the Case

This is an as-yet-uncertified securities fraud class action brought by Plaintiff Donald Johnson on behalf of himself and a Class consisting of all other persons who purchased the common stock of DaimlerChrysler AG ("DCX") on nine different dates between March 19, 1999 and June 11, 1999 (the "Purchase Dates"). Plaintiff seeks damages based on Defendants' alleged violations of the Securities Exchange Act of 1934 (the "1934 Act"). Plaintiff asserts claims against three Defendants: 1) Tracinda Corporation ("Tracinda") 2) Kirk Kerkorian ("Kerkorian"), and 3) James D. Aljian ("Aljian").[1] Tracinda Corporation is wholly owned by Kerkorian. Aljian is an officer of Tracinda and a

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[1] Collectively, Kerkorian and Aljian are referred to as "the individual Defendants."

member of the DaimlerChrysler Shareholder Committee.

B. Plaintiff's Claims

Plaintiff asserts the following claims: (1) violations of § 10(b) of the 1934 Act and Rules 10b-5 and 10b5-1 promulgated thereunder (15 U.S.C. § 78j; 17 C.F.R. §§ 240.10b-5, 240.10b5-1) against all Defendants; (2) control person liability based on § 20(a) of the 1934 Act (15 U.S.C. § 78t) against the individual Defendants; and (3) contemporaneous trading liability based on § 20A(a) of the 1934 Act (15 U.S.C. § 78t-1) against all Defendants.[2]

C. Plaintiff's Allegations

Plaintiff alleges the following in the Complaint:

On February 24, 1999, Aljian attended a Shareholders Committee Meeting at which the attendees were given a board report ("the Report"), marked "strictly confidential," entitled "Daimler

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[2] Specifically, Plaintiff asserts a claim against Defendants Tracinda and Kerkorian based on § 20A(a), 15 U.S.C. § 78t-1(a), which imposes liability on persons who engage in insider trading for damages suffered by individuals who trade contemporaneously with the insider. Plaintiff also asserts a claim against Defendant Aljian based on § 20A(c) of the 1934 Act, 15 U.S.C. § 78t-1(c), which imposes joint and several liability on tippers.

Chrysler Operative Planning 1999-2001." (Compl. ¶ 3). The Report projected a "significant" free cash flow decline. *Id.* After the meeting, Aljian returned to Tracinda's offices and placed the Report in Tracinda's central files. (Compl. ¶ 4). These files were readily accessible to Kerkorian; Aljian knew they were accessible to Kerkorian. *Id.*

In March 1999, Aljian obtained knowledge of information contained in the Report; specifically he obtained knowledge regarding the significant decline in DaimlerChrysler's cash flow in 1999. (Compl. ¶ 5).

On March 19, 1999, Tracinda sold one million shares of DCX for $93,746,866.66. *Id.* Between March 19, 1999, and June 11, 1999, Tracinda sold a total of 7,642,241 DCX shares for proceeds totaling $661,677,282. (Compl. ¶¶ 6, 30-31).

Shortly after these sales were completed, on July 29, 1999, information regarding DaimlerChrysler's declining cash flow went public, resulting in an 8.8% decline in the stock's value. (Compl. ¶¶ 33-34.)

Aljian was responsible for overseeing the investment decisions of Tracinda, and Aljian and Kerkorian regularly conferred regarding whether to sell shares held by Tracinda. (Compl. ¶ 4).

D. The Present Action

This action was filed on August 21, 2003; the First Amended Complaint ("FAC") was filed on January 23, 2004.

II. Standard for Dismissal Pursuant to Fed.R.Civ.P. 12(b)(6)

Defendants' Motion requires the Court to determine whether the Complaint states any claim upon which relief may be granted. *See* Fed R. Civ. P. 12(b)(6). The Court will not dismiss Plaintiff's claims for relief unless he cannot prove any set of facts in support of his claims that would entitle him to relief. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). In limiting its inquiry to the content of the Complaint, the Court must take the allegations of material fact as true and construe them in the light most favorable to the plaintiff. *See Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). Additionally, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994).

III. Statute of Limitations

A. Statute of Limitations Governing § 10(b) and § 20(a)

1. Conduct Prohibited by § 10(b) and § 20(a)

Generally, § 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder "prohibits any person from using or employing any 'manipulative or deceptive device' in connection with the sale of a security." *In re VeriFone Securities Litigation*, 11 F.3d 865, 868 (9th Cir. 1993) (citing 17 C.F.R. § 240.10b-5).

A violation of § 20(a) of the 1934 Act requires: "(1) a primary violation of federal securities laws ... and (2) that the defendant exercised actual power or control over the primary violator." *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000). A primary violation consists of the "transactions giving rise to the alleged securities violation." *Id.* (internal citations omitted). Here, the alleged primary violation is based on § 10(b) and Rule 10b-5.

2. Pre-1991 Statute of Limitations

The 1934 Act did not set a limitations period for § 10(b) claims. *See Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 876 (9th Cir. 1984). Prior to 1991, courts disagreed about the proper statute of limitations for such claims. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 354, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321 (1991) , *superseded on other grounds by* Pub.L. 102-242, § 476, 105 Stat. 2236 (1991) (providing that the pre-*Lampf* statute of limitations applied to actions pending at the time of the Supreme Court's decision in *Lampf*). Many courts, including the Ninth

Circuit, "borrowed" the most analogous state statute of limitations. *Mosesian*, 727 F.2d at 876 ("Congress did not provide a statute of limitations for private actions brought under section 10(b) .... The federal courts therefore borrow the forum state's statute of limitations for fraud actions.").

In 1991, however, the Supreme Court set a uniform statute of limitations: "one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf*, 501 U.S. at 364, 111 S.Ct. 2773; *accord Sterlin v. Biomune Systems*, 154 F.3d 1191, 1195 (10th Cir. 1998); *In re Heritage Bond Litigation*, 289 F.Supp.2d 1132, 1148-49 (C.D.Cal. 2003) .

3. The Sarbanes-Oxley Act of 2002

In 2002, Congress enacted the Sarbanes-Oxley Act of 2002 ("the SOA"), which lengthened the statute of limitations for claims "involv[ing] fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws" to the lesser of "(1) 2 years after the discovery of the facts constituting the violation[,] or (2) five years after such violation." Pub.L. No. 107-204, § 804(a), 116 Stat. 745 (2002).[3]

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[3] This provision was codified in Title 28, not Title 15. The new statute of limitations provides:

> (b) ... [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory

(continued...)

Because Plaintiff has not alleged that he discovered the facts underlying the claims at a date that would trigger the shorter period, the Court will use the longer one.

The Complaint was filed on August 21, 2003. Plaintiff alleges that Defendants' last violation of §§ 10(b) and 20(a) occurred on June 11, 1999. Prior to the SOA, enacted on July 30, 2002, these claims would have clearly been barred by the 1934 Act's then-applicable three-year statute of limitations. *Lampf*, 501 U.S. at 364, 111 S.Ct. 2773.

The SOA increased the one-to-three-year statute of limitations for §§ 10(b) and 20(a) claims to a two-to-five-year period. *See* Pub.L. No. 107-204, § 804(a).[4] The SOA states that it applies "to all

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> requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of— (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.

28 U.S.C. § 1658(b).

[4] Specifically, Congress kept in place § 10(b)'s two-tiered statute of limitations. After *Lampf* was decided in 1991, but prior to the passage of the SOA in 2002, § 10(b) claims were subject to a limitations period of the lesser of (1) one year after the discovery of the facts constituting the violation; or (2) within three years after such violation. *Lampf*,

(continued...)

proceedings ... commenced on or after the date of enactment of this Act." *Id.* at § 804 (codified at 28 U.S.C. § 1658(b), 2002 Amendment Note).

Plaintiff argues that, notwithstanding the fact that the SOA was passed over a month after the statute of limitations on Plaintiff's claims had expired, his expired claims were revived because he filed his Complaint after the SOA's enactment, and within five years of the alleged violations. The Court is unpersuaded.

4. *Landgraf* Retroactivity

The SOA does not expressly *include* actions that accrued prior to its passage; rather, it applies to proceedings "commenced on or after" its enactment. The Supreme Court has recognized that, absent an explicit provision applying new legislation retroactively, courts should not imply one: "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994) (holding that damage provisions of the Civil Rights Act of 1991 did not apply to a

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501 U.S. at 364, 111 S.Ct. 2773. The SOA extended the statute of limitations, but left the two-tiered structure intact. Pub.L. No. 107-204, § 804(a). The statute of limitations for securities fraud is now the lesser of two years after discovery or five years after the violation. *Id.* (codified at 28 U.S.C. § 1658(b)(1)-(2)).

case pending on appeal when the statute was enacted). As the Supreme Court recognized, a statute's retroactive application can result in the "unfairness of imposing new burdens on persons after the fact." *Id.* at 270, 114 S.Ct. 1483. Therefore, courts will construe statutes to apply retroactively only when "Congress first make its intention clear" that the statute is to be so applied. *Id.* at 268, 114 S.Ct. 1483. This requirement assures the Court that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 272-73, 114 S.Ct. 1483.

Determination of whether a statute, enacted after the events underlying a plaintiff's claims, is subject to a multi-step test, first articulated by the Supreme Court in *Landgraf*. First, a court must determine if "Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 264, 114 S.Ct. 1483. If Congress does so, the court's inquiry ends. However, if Congress does not expressly prescribe the statute's proper reach, the court must then determine whether the statute has an impermissible "retroactive effect." *Id.* In other words, the court must determine whether the statute, applied retroactively, would "impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If so, a presumption that the statute should not be applied retroactively controls. This presumption controls unless there is an expression

of congressional intent to the contrary. *Id.* Accordingly, the Court applies the *Landgraf* test to the SOA.

a. Statutory Language

Plaintiff suggests that Congress makes clear its intent to revive his extinguished claims via the SOA's express language, which makes the SOA applicable "to all proceedings ... commenced on or after the date of enactment of this Act." Pub.L. No. 107-204, § 804(a). There is nothing in this language that specifically addresses whether the new statute of limitations should apply to claims already barred by the existing statute of limitations at the time of enactment. *See Heritage*, 289 F.Supp.2d at 1148 ("[T]he Act does not address whether the revised statute of limitations should apply to claims barred by the existing statute of limitations at the time of enactment.").

Plaintiff cites one unpublished district court case supporting his proposition. *In re Sawtek Sec. Litig.*, No. 6:03-cv-294-Or1031DAB (M.D.Fla. Dec. 19, 2003). This case is unpersuasive. In *Sawtek*, the court merely noted that the "plain meaning" of the express language "clearly and unambiguously states" that if any proceeding were commenced after the SOA became law, the new SOA statute of limitations would apply in all cases.

This Court finds there is no express language in the SOA authorizing retroactive application of the statute of limitations provision of the SOA.

However, Congress did not expressly preclude such retroactive application, either. Therefore, the Court cannot conclude that Congress has "expressly prescribed the statute's proper reach," *Landgraf*, 511 U.S. at 264, 114 S.Ct. 1483, and proceeds to the second step in the *Landgraf* analysis.

b. Retroactive Effect of the SOA

The Court now turns its attention to the question of whether retroactive application of the SOA statute of limitations provision imposes an impermissible retroactive burden on Defendants. Based on controlling Ninth Circuit authority, the Court concludes that it does.

In *Chenault v. United States Postal Service*, 37 F.3d 535 (9th Cir. 1994), the Ninth Circuit addressed the effect on previously time-barred claims of an amendment to the Civil Rights Act of 1964 that extended the statute of limitations. In *Chenault*, a postal worker brought suit against his employer for constructively discharging him from his position by failing to provide him with a reasonable accommodation for his handicap under the Rehabilitation Act of 1973. *Id.* at 536. The employee neglected to file a his failure-to-accommodate claim within thirty days of the final administrative decision, as required by the statute at that time. *Id.* at 536-37. The district court ruled that his claim was time-barred. *Id.* at 536.

While his constructive discharge claim was pending, Congress extended from thirty to ninety

days the time in which a plaintiff may file suit after a final administrative decision is rendered. *Id.* at 537. The employee argued that his failure-to-accommodate claim was revived under the new statute of limitations. *Id.* The Ninth Circuit held that to apply the new statute of limitations retroactively would "alter the substantive rights" of a party and "increase a party's liability," as the party would be "forced to defend an action that was previously time-barred." *Id.* at 537, 539. In holding that the new statute of limitations could not be applied retroactively, the court stated "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme." *Id.* at 539.

The Supreme Court has indicated its approval of *Chenault's* holding in a case involving the retroactive application of an amendment to the False Claims Act ("FCA"). *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950-52, 117 S.Ct. 1871, 1878-79, 138 L.Ed.2d 135 (1997). The FCA permits suits by private parties on behalf of the United States against anyone who submits a false claim to the government. 31 U.S.C. § 3730(b). The provision at issue permitted *qui tam* actions to proceed based on information already in the government's possession. *Hughes Aircraft*, 520 U.S. at 945-46, 117 S.Ct. 1871. The parties agreed that if the amendment did not apply, the plaintiff's claims were barred. *Id.* at 945, 117 S.Ct. 1871. In comparing its case to *Chenault*, the Court stated

"[t]he [newly-enacted] amendment would revive that action, subjecting [the defendants] to previously foreclosed ... litigation, much like extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action." *Id.* at 950, 117 S.Ct. 1871 (citing *Chenault*, 37 F.3d at 537).

The present action is not distinguishable. If the Court were to apply the SOA statute of limitations retroactively, Defendants, like the defendants in *Chenault*, would be required to defend a claim that was previously time-barred.

In arguing that the amendment has no impermissible retroactive effect, the Plaintiff makes an argument based on *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189 (S.D.N.Y. 1996). In *Cabiri*, the court considered the retroactivity of the Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 Stat. 73 (1991). *Cabiri*, 921 F.Supp. at 1195. The Court acknowledged that the Act was silent as to the question of retroactive application, but nevertheless concluded that a cause of action under the Act could be applied to conduct that predated its enactment. *Id.* at 1195-96. In doing so, the court considered *Landgraf*, noting that the *Landgraf* Court was concerned with "[e]lementary considerations of fairness" that required courts to refrain from disrupting "settled expectations." *Id.* at 1195 (quoting *Landgraf*, 511 U.S. at 265, 114 S.Ct. 1483). The *Cabiri* court noted that the use of torture by a state official was universally condemned by

"established norms of international law of human rights" and "the law of nations." *Id.* (internal citations omitted). The *Cabiri* defendant's settled expectations, therefore, would have been that conduct constituting torture violated international law. As such, the Torture Victim Act is more properly viewed as a mere jurisdictional statute that does not change the substantive rights of the defendant. Accordingly, it could be applied retroactively. *Landgraf*, 511 U.S. at 274, 114 S.Ct. 1483 ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed ...."), *quoted in Cabiri*, 921 F.Supp. at 1195-96.

Here, the settled expectations of the parties at the effective date of the SOA was that the § 10(b) and § 20(a) claims were barred by the relevant statute of limitations. Unlike the statute at issue in *Cabiri*, the SOA is more than a mere jurisdictional statute that changes the forum in which a particular claim might be heard. Rather, the SOA confers additional substantive rights by extending the statute of limitations. Therefore, the SOA is subject to the presumption against retroactive application of new legislation, absent contrary congressional intent.

c. Congressional Intent

Plaintiff argues that the legislative history of the SOA supports his position that the new statute of limitations should be applied to revive extinguished

claims. Reference to legislative history is appropriate only when the text of the statute is ambiguous. *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 753 (9th Cir. 2003) (holding that courts are precluded from considering legislative history where the text of the statute is unambiguous). Here, the SOA provision extending the statute of limitations for securities fraud claims is ambiguous as to the issue of whether the limitations period was meant to apply to claims that were already time barred under the previous statute, so reference to legislative history is appropriate. However, reference to legislative history does little to clear up this matter.

Plaintiff points to a statement by Senator Daschle:

> By extending the time period during which victims can bring cases to recoup their losses, the [SOA] removes the reward for those fraud artists who are especially gifted at concealing what they've done for lengthy periods of time.

148 Cong. Rec. S6436-02, S6347 (daily ed. July 9, 2002) (statement of Senator Daschle). This general statement merely recognizes the proposition that securities fraud claims are difficult to discover, and does not discuss whether the amendment to the statute of limitations was meant to revive extinguished claims.

Plaintiff also quotes a portion of the section-by-section analysis of the SOA, printed into the Congressional Record. 148 Cong. Rec. S7418-01 (daily ed. July 26, 2002). Referring to § 804 of the SOA, the analysis states:

> This section would set the statute of limitations in private securities fraud cases to the earlier of two years after the discovery of the facts constituting the violation or five years after such violation. The current statute of limitations for most private securities fraud cases is the earlier of three years from the date of the fraud or one year from the date of discovery. This provision states that it is not meant to create any new private cause of action, but only to govern all the already existing private causes of action under the various federal securities laws that have been held to support private causes of action. This provision is intended to lengthen any statute of limitations under federal securities law, and to shorten none. *The section, by its plain terms, applies to any and all cases filed after the effective date of the Act, regardless of when the underlying conduct occurred.*

Id. (emphasis added). This statement is ambiguous as well. It is capable of Plaintiff's interpretation, i.e., that the longer statute of limitations was meant

to revive claims that had been extinguished by the previous statute of limitations. However, the more likely meaning is that the new statute of limitations applies to all actions in which the complaint is filed after the effective date of the SOA, and is not limited to *conduct* occurring after the SOA's effective date. This construction is supported by the statement's reference to § 804's "plain terms." Those "plain terms" state that the SOA applies "to all proceedings ... *commenced* on or after the date of enactment of this Act." Pub.L. No. 107-204, § 804(a) (emphasis added).

To overcome the *Landgraf* presumption against retroactivity, Plaintiff has an uphill climb: he must show a expression of congressional intent to apply a statute retroactively. The legislative history cited by Plaintiff does not meet this standard.

Moreover, in order to determine congressional intent, the Court must, if such a construction is possible, read legislative enactments in such a manner as to give meaning to each provision. *In re Cervantes*, 219 F.3d 955, 961 (9th Cir. 2000) ("[S]tatutes should not be construed in a manner which robs specific provisions of independent effects."). If the Court were to adopt the interpretation advanced by Plaintiff, i.e., that the extended statute of limitations was meant to be applied retroactively, the Court would be unable to reconcile this provision with § 804(c) of the SOA, which states that "[n]othing in this section shall create a new, private right of action." Pub.L. No. 107-204, § 804(c). *See In re Enterprise Mortgage*

Acceptance Co., LLC, Securities Litigation, 295 F.Supp.2d 307, 312-13 (S.D.N.Y. 2003) (reading § 804(a) (statute of limitations provision) in conjunction with § 804(c) (no new substantive rights provision) and concluding "it is not clear from the language of [§] 804 that it permits revival of previously time-barred claims."). Therefore, reading § 804(a) and § 804(c) together, it is clear Congress did not intend to revive time-barred claims. To conclude otherwise would fail to give each provision meaning, contrary to the dictate of *In re Raymond Cervantes*.

The Court finds no congressional intent sufficient to overcome the *Landgraf* presumption against retroactivity.

d. Ruling Based on *Landgraf* Retroactivity

Under *Landgraf*, the Court has determined that Congress failed to "expressly prescribe" the amendment's proper reach; however, the Court has also concluded that applying the amendment retroactively would have an impermissible "retroactive effect." Accordingly, the presumption that the amendment should not be applied retroactively applies and, because there is no clear expression of congressional intent to the contrary, this presumption controls. Accordingly, this Court holds that Plaintiff's §§ 10(b) and 20(a) claims are barred by the applicable statute of limitations.[5]

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[5] Because Plaintiff's § 20(a) cause of action is barred by the statute of limitations, the Court need not

(continued...)

B. Statute of Limitations-§ 20A

Section 20A imposes liability on inside traders for damages suffered by contemporaneous traders: "an insider who trades stock 'while in possession of material, nonpublic information' is liable to any person who traded contemporaneously with the insider." *In re Advanta Corp. Securities Litigation*, 180 F.3d 525, 541 (3d Cir.1999) (quoting 15 U.S.C. § 78t-1(a)). Section 20A was added to the 1934 Act in 1988 to "provide greater deterrence, detection and punishment of violations of insider trading." *Lampf*, 501 U.S. at 361, 111 S.Ct. 2773 (internal citations and quotation marks omitted). The Court noted that the 1988 addition "focuse[d] upon a specific problem, namely, the purchasing or selling [of] a security while in possession of material, nonpublic information." *Id.* (internal quotations marks and citations omitted).

Since its inception, § 20A has had a five-year statute of limitations. *Id.*; 15 U.S.C. § 78t-1(b)(4).

Claims under § 20A are derivative, and require proof of a separate underlying violation (a "predicate violation") of the 1934 Act. *Advanta*, 180 F.3d at 541. Plaintiff presents the Court with the novel question of whether § 20A survives when its

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apply to § 20(a) the Court's subsequent analysis regarding § 20A, even though a violation of both sections requires a "predicate violation."

predicate claim, here a violation of § 10(b), is barred by the statute of limitations. Plaintiff argues that his § 20A claim is actionable, notwithstanding the expiration of the statute of limitations with respect to the § 10(b) predicate claim, so long as he pleads and proves the elements of his predicate claim.

In cases in which § 20A claims have been dismissed for lack of a predicate claim, at least one element of the predicate claim had not been sufficiently pleaded. *See, e.g., In re VeriFone Securities Litigation*, 11 F.3d 865, 870, 872 (9th Cir. 1993) (dismissing plaintiffs' § 20A claim because they failed to allege facts supporting the "materiality" element of the predicate claim); *Advanta*, 180 F.3d at 541 (dismissing plaintiffs' § 20A claim because they failed to allege facts supporting scienter); *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697 (dismissing plaintiff's § 20A claim based on plaintiff's failure to allege any violation of the 1934 Act). Few courts have addressed the issue of whether a § 20A claim may proceed when the predicate claim is time barred. Neither of the two cases of which the Court is aware provide any real guidance to the Court in resolving this issue.

One district court case directly addressed the effect of a potentially complete, yet time-barred, § 10(b) claim on a § 20A claim. *See Sterlin v. Biomune Sys.*, 960 F.Supp. 1531, 1537 (D.Utah 1997). The court in *Sterlin* dismissed all of plaintiff's claims, including his § 20A claim as "barred by the one year statute of limitations." *Id.* However, the court

neither engaged in any discussion about, nor gave any rationale for, its dismissal of the § 20A claims. *Id.* In the absence of a substantive rationale for dismissal of the § 20A claims, the Court does not find this authority persuasive.[6]

At oral argument, Plaintiff's counsel brought to the Court's attention a second case, one that supports his argument that the § 20A claim should proceed notwithstanding that the predicate claims are time barred. *See Hogan v. Piaseck*, No. 96 C 7399, 1997 WL 359984, 1997 U.S. Dist. LEXIS 9004 (N.D. Ill., June 18, 1997). The court in *Hogan* indicated its approval of the position that § 20A claims could proceed, notwithstanding the dismissal of the predicate claims on statute of limitations grounds, in light of the absence of legal authority to the contrary and the explicit five-year statute of limitations for § 20A claims. *Id.*, 1997 WL 359984 at *1, 1997 U.S. Dist. LEXIS 9004 at *2-3. Plaintiffs in *Hogan* had made this argument in connection with

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[6] Upon appeal, the Tenth Circuit Court of Appeals merely "presumed" the lower court's dismissal of those claims was premised upon the expired statute of limitations of their predicate claims; the court had no reason to review this issue, as the plaintiff did not argue that the § 20A claim survived even if the predicate claim was time barred. *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1194 fn. 5 (10th Cir. 1998). Nor did the lower court, upon remand, revisit the § 20A claim. *Sterlin v. Biomune Systems, Inc.*, 114 F.Supp.2d 1163 (D.Utah 2000).

a motion for reconsideration of a dismissal order. *Id.*, 1997 WL 359984 at *1, 1997 U.S. Dist. LEXIS 9004 at *1. The court stated, in dicta, that although this argument "made sense legally," the argument did not change its earlier ruling, because the dismissal was not based on the statute of limitations. *Id.*, 1997 WL 359984 at *1-2, 1997 U.S. Dist. LEXIS 9004 at *2-4. Because this statement is mere dicta, *Hogan* is of little persuasive value. Nevertheless, for the reasons set forth below, the Court agrees with Plaintiff's position.

At the time of the conduct complained of in this action, the statute of limitations governing § 20A claims had been in effect for over a decade. Although Defendants may have had an expectation of repose after three years for any violation of § 10(b), they had ample notice that § 20A liability could be imposed based on claims filed up to five years after such violation. After all, although it was not until 2002 that the SOA extended the statute of limitations for § 10(b) and § 20(a), the five-year statute of limitations for § 20A had remained constant since § 20A's inception in 1988, eleven years before the subject trades.

Defendants point out that there was no uniform statute of limitations for § 10(b) claims at the time Congress enacted § 20A. *Lampf*, 501 U.S. at 354, 111 S.Ct. 2773. Nevertheless, had Congress intended that § 20A claims be time-barred whenever the predicate violation was time-barred, Congress could have so provided. It could have done so by either linking the statute of limitations of the

§ 20A claim to that governing the predicate violation, or by enacting a uniform statute of limitations for the 1934 Act.

Defendants also argued that *Jackson National Life Insurance Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 703-04 (2d Cir. 1994), supports their position. In *Jackson*, the Second Circuit held that § 20A must be based on a predicate violation of the 1934, rejecting Plaintiff's attempt to base a § 20A claim on a predicate violation of the 1933 Act. *Id.* at 703-04. The Second Circuit went on to note that, in any event, because the statute of limitations on the 1933 Act claim had expired, the § 20A claim would be barred as well. *Id.* at 704. The court viewed the three-year statute of limitations for the 1933 Act as the absolute limit for any claims under the 1933 Act, and that permitting a § 20A claim to proceed based on a predicate violation of the 1933 Act would violate that absolute limit. *Id.* The Court disagrees that the same conclusion is compelled when the § 20A claim is based on a predicate violation of the 1934 Act. The Jackson court itself recognized that "Congress added § 20A ... to remedy the very specific problems inherent in insider trading cases[,]" and that "the [longer] five-year limitations period [of § 20A] recognizes the difficulties of ferreting out evidence sufficient to prosecute insider trading cases." *Id.* at 703 (internal citations and quotation marks omitted). The *Jackson* court rejected applying § 20A's longer statute of limitations to a 1933 Act claim, stating:

> Because the difficulties of pleading and proving scienter and the other elements of a Rule 10b-5 action do not similarly impede claims [under the 1933] Act, it would skew the legislative balance of interests to apply § 20A's five-year limitations period to the lower threshold of liability applicable to the initial distribution of securities under the [19]33 Act.

Id. at 704 (internal citations omitted). Unlike the claims presented in Jackson, the claims asserted in this action implicate the problems inherent in advancing insider trading claims. Accordingly, the Court finds *Jackson* unpersuasive on this issue.

The Court finds no reason to hold that Plaintiff's § 20A claim is barred simply because the predicate claim upon which it is based is time barred. Although cases have dismissed a plaintiff's § 20A claim upon the dismissal of the predicate claim, the dismissal of the predicate claim in those cases was based on a defect in the predicate claim other than the statute of limitations. Unquestionably, Plaintiff must plead and prove the predicate claim in order to prevail on his § 20A claim, but the longer limitations period of § 20A permits him to attempt to do so. This is especially true in light of the stated congressional purpose in enacting § 20A in 1988: to address the uniquely difficult discovery problems inherent in insider trading cases, and to provide greater deterrence, detection, and punishment for insider trading violations. *Lampf*, 501 U.S. at 361,

111 S.Ct. 2773. The Court holds that Plaintiff's § 20A claim is not barred by the statute of limitations.

C. Ruling on Statute of Limitations

As set forth above, Plaintiff may not maintain his claims based on § 10(b) or § 20(a). These claims are time barred. Nevertheless, Plaintiff may pursue his § 20A claim. To prevail on his § 20A claim, Plaintiff must plead and prove all the elements of a § 10(b) violation.

IV. Pleading a § 20A Claim

A. § 20A Elements

Section 20A imposes liability on insiders for damages suffered by persons who trade contemporaneously with the insider. 15 U.S.C. § 78t-1(a). "[A]n insider who trades stock 'while in possession of material, nonpublic information' is liable to any person who traded contemporaneously with the insider." *Advanta*, 180 F.3d at 541 (quoting 15 U.S.C. § 78t-1(a)). Accordingly, Plaintiff must plead that he traded contemporaneously with Defendants.

Plaintiff has alleged such contemporaneous trading on nine specific dates in 1999 (the "subject trades"). (Compl. ¶ 1.)

Plaintiff must also plead all the elements of the predicate violation in order to maintain his § 20A

claim. *In re VeriFone Securities Litigation*, 11 F.3d at 872 (9th Cir. 1993); *Advanta*, 180 F.3d at 541. Plaintiff must therefore sufficiently plead a § 10(b) claim in order to maintain his § 20A claim. Therefore, the Court examines the pleading requirements for insider trading in violation of § 10(b) and Rule 10b-5.

B. Insider Trading Elements

"[A] person violates Rule 10b-5 by buying or selling securities on the basis of material nonpublic information if: (1) he owes a fiduciary or similar duty to the other party to the transaction; (2) he is an insider of the corporation in whose shares he trades, and thus owes a fiduciary duty to the corporation's shareholders; or (3) he is a tippee who received his information from an insider of the corporation and knows, or should know, that the insider breached a fiduciary duty in disclosing the information to him." *S.E.C. v. Clark*, 915 F.2d 439, 443 (9th Cir. 1990) (citing *Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980); *accord Dirks v. S.E.C.*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983)). In construing Rule 10b-5, the Supreme Court had held that when a corporate insider trades on the basis of material, nonpublic information, he or she employs a "deceptive device" as that term is used in Rule 10b-5.[7] *United States v. O'Hagan*, 521 U.S. 642, 651-52,

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[7] In relevant part, Rule 10b-5 provides: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of

(continued...)

117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (citing *Chiarella*, 445 U.S. at 228, 100 S.Ct. 1108).

The Ninth Circuit has articulated the elements for an insider trading claim as the 1) intentional 2) misrepresentation or failure to disclose 3) a material fact 4) in connection with the purchase or sale of securities. *Caravan Mobile Home Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 769 F.2d 561, 563-64 (9th Cir. 1985) (internal citations omitted). In keeping with the "disclose or abstain" rule[8] of insider information, these elements require that an insider have knowledge of material inside information and intentionally trade on that information without disclosing it to the public. *See id.* The Court examines each of these elements.

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interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud ...."17 C.F.R. § 240.10b-5

[8] The "disclose or abstain" rule states that a corporate insider has a traditional, affirmative duty to "abstain from trading in the shares of his corporation unless he has first disclosed all material nonpublic information known to him." *Chiarella*, 445 U.S. at 227, 100 S.Ct. at 1114. The duty arose from "(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure." *Id.* (internal citations omitted).

1. Intent

The Supreme Court held that a violation of § 10(b) of the 1934 Act requires an allegation of scienter, i.e., the "intent to deceive, manipulate, or defraud," and that an allegation of negligence alone will not suffice. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S.Ct. 1375, 1381, 47 L.Ed.2d 668 (1976).

No discussion of scienter would be complete without reference to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 ("PSLRA"). Relevant to the current discussion, the PSLRA provides:

> In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

15 U.S.C. § 78u-4(b)(2). Congress' intent in passing the PSLRA was to "deter opportunistic private plaintiffs from filing abusive securities fraud claims." *In re Silicon Graphics, Inc., Securities Litigation*, 183 F.3d 970, 973 (9th Cir. 1999). Relevant to the present Motion, the PSLRA imposes

heightened pleading standards[9] for scienter. 15 U.S.C. § 78u-4(b)(1)-(2).

In the lead case in the Ninth Circuit interpreting the PSLRA, the Ninth Circuit focused on allegations regarding reckless conduct that, the plaintiffs maintained, satisfied the "strong inference" standard. The Ninth Circuit held that under the PSLRA, a private securities plaintiff must plead scienter by describing "in great detail, facts that constitute strong circumstantial evidence of *deliberately* reckless or conscious misconduct." *Silicon Graphics*, 183 F.3d at 974 (emphasis added); 15 U.S.C. § 78u-4(b)(2). Although recklessness may satisfy the PSLRA's pleading standard, it may do so only when the recklessness approximates deliberate conduct "[R]ecklessness ... satisfies [the] scienter [requirement only] to the extent that it reflects some degree of intentional or conscious misconduct." *Silicon Graphics*, 183 F.3d at 977 .

Significantly, the Ninth Circuit explicitly rejected the notion that scienter may be pleaded

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[9] Although the circumstances constituting fraud must be generally pleaded with particularity, Fed.R.Civ.P. 9(b), the PSLRA imposes even more stringent pleading requirements on plaintiffs alleging securities fraud under the 1934 Act and Rule 10b-5, especially with respect to allegations of scienter. *See* 2 James Wm. Moore et al., Moore's Federal Practice § 9.03[6][a][i] (3d ed. 2004); 15 U.S.C. § 78u-4(b)(1)-(2).

merely by pleading motive and opportunity: "[M]otive to commit fraud and [an] opportunity to do so ... are not sufficient to establish a *strong* inference of [the] deliberate recklessness" necessary to plead scienter. *Id.* at 974. In the Ninth Circuit's view, its holding better reflects Congress' purpose in enacting the PSLRA: to end the practice of plaintiffs pleading "fraud by hindsight" in securities fraud complaints. *Id.* at 988.

Claims that fail to meet this heightened pleading standard are subject to dismissal: "[O]nly complaints with particularized facts giving rise to a *strong* inference of wrongdoing survive a motion to dismiss." *Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002) (emphasis added); 15 U.S.C. § 78u-4(b)(3)(A). Because of the "strong" inference requirement, "the court must consider ... inferences unfavorable to plaintiffs." *Gompper*, 298 F.3d at 897.

In reaching its holding in *In re Silicon Graphics*, the Ninth explicitly rejected the looser pleading standard required by the Second Circuit, which requires plaintiffs to show only "simple recklessness or a motive to commit fraud and [an] opportunity to do so." *Silicon Graphics*, 183 F.3d at 974. The Ninth Circuit court distinguished between "mere recklessness," which suffices in the Second Circuit, and "deliberate recklessness," which, in the Ninth Circuit's view "come[s] closer to demonstrating [actual] intent, rather than mere motive and opportunity." *Id.* This holding, the Ninth Circuit reasoned, was more in keeping with the PSLRA's

purpose to "deter opportunistic private plaintiffs from filing abusive securities fraud claims, in part, by raising the pleading standards." *Id.* at 973. Congress intended to prevent those claims without a "strong inference" of deliberateness or intent. *Id.* at 974.

Plaintiff urges this Court to adopt the Second Circuit scienter standard, which finds an insider trading violation "occurs when a trade is conducted in 'knowing possession' of material nonpublic information." *In re Oxford Health Plans, Inc.*, 187 F.R.D. 133, 143 (S.D.N.Y. 1999) (quoting *U.S. v. Teicher*, 987 F.2d 112, 120 (2d Cir. 1993)). The Oxford Court, in applying this "knowing possession" standard, stated that an insider trading violation "does not require ... that a causal connection exist between the knowing possession of the information and the trade, that is, it does not require that defendants 'use' the information when trading." *Oxford*, 187 F.R.D. at 143.

Defendants, on the other hand, argue that adoption of the Second Circuit standard is foreclosed by the Ninth Circuit case of *United States v. Smith*, 155 F.3d 1051, 1069 (9th Cir. 1998). In *Smith*, the Ninth Circuit explicitly rejected the Second Circuit's "knowing possession" standard in favor of what it referred to as the "use" requirement. *Smith*, 155 F.3d at 1066-69. The court held that in order for a plaintiff to prove a Rule 10b-5 violation, he or she must "demonstrate that the suspected inside trader *actually used* material nonpublic

information in consummating his transaction." *Smith*, 155 F.3d at 1069 (emphasis added).

However, *Smith* was a criminal case, and the Ninth Circuit explicitly declined to determine whether or not it would apply the same standard in a civil case. *Smith*, 155 F.3d at 1069 n. 27. The *Smith* court cited with approval the Eleventh Circuit case of *S.E.C. v. Adler*, 137 F.3d 1325, 1337-39 (11th Cir. 1998), which held that although knowing possession of insider information is not a *per se* violation, when an insider trades while in possession of material, nonpublic information, a strong inference arises that such information was used by the insider in trading. *Id.* Despite citing *Adler* with approval, however, the Ninth Circuit did not apply its holding in *Smith*. *Smith*, 155 F.3d at 1069. The court noted that to apply to the *Smith* case the evidentiary presumption set forth in *Adler* would be tantamount to shifting the burden of proof to the accused, which is impermissible in light of the constitutional protections for criminal defendants. *Smith*, 155 F.3d at 1069. The Ninth Circuit explicitly reserved the issue of whether the *Adler* presumption should be applied in a civil case. *Id.* at n. 27 ("We express no view as to whether or not an *Adler*-type presumption may be employed in *civil* enforcement proceedings under Rule 10b-5").

The Court will apply the presumptions of *Adler* in the present civil case. Although application of the heightened "actual use" standard in a criminal case may be necessary to protect the constitutional rights of the accused, the same is not true for a defendant

in a civil case. Here, Plaintiff alleges that Defendants traded while in knowing possession of the Report. This allegation, especially when viewed in connection with Plaintiff's suspicious trading, detailed below, suffices to raise the strong inference of scienter required by the PSLRA.

Supporting the Court's holding that Plaintiff has sufficiently alleged scienter are Defendants' "unusual" or "suspicious" stock sales. Plaintiff correctly notes that "unusual" or "suspicious" insider stock sales may constitute circumstantial evidence of scienter. *Silicon Graphics*, 183 F.3d at 986. However, such sales are unusual or suspicious only when they are "'dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside information.'" *Id.* (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1117 (9th Cir. 1989)). Therefore, the Court looks to whether Plaintiff has alleged that Defendants' trading was out of line with its prior trades. The relevant factors from which the court may infer an indicia of scienter are: (a) the amount and percentage of shares sold by insiders; (b) the timing of the sales; and (c) whether the sales were consistent with the insider's prior trading history. *Silicon Graphics*, 183 F.3d at 986.

a. The Amount and Percentage of Shares Sold

Plaintiff has alleged that Defendants began selling one-million share blocks of Tracinda's DCX stock within one month of receiving the inside information, and that within four months after

receiving the inside information, Tracinda had sold over 7.5 million shares. The net proceeds from the sale of these shares exceeded $661.6 million. This is significant evidence of scienter. A large number of shares were sold and the proceeds received exceeded half a billion dollars. Even to a multi-billion dollar corporation, this is a significant amount. The percentage of the shares sold represented 18% of Tracinda's holdings of DCX stock; contrary to Defendants' position, the Court finds this percentage significant as well, when considered along with the proceeds of those sales.[10] Plaintiff's

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[10] *Cf. In re Vantive Corporation Securities Litigation*, 283 F.3d 1079, 1092 (9th Cir. 2002) (holding that sales of 38% of an insider's stock was not suspicious in light of an abnormally long sixteen-month class period during which the stock was sold); *Ronconi v. Larkin*, 253 F.3d 423, 435 (9th Cir. 2001) (noting, without discussion, that sales by the CEO and CFO of 10% and 17% of their stock was not suspicious); *In re Silicon Graphics*, 183 F.3d at 987-88 (finding sales of 46% of one insider's stock was not significant in light of the fact that the sales constituted only 5% of the total stock sales with which the plaintiff was concerned and in light of the lack of data regarding past sales by the insider; and finding sales of 65% of a second insider's stock was not significant in light of the fact that he had acquired the stock in payment for his own former business and that trading restrictions on his stock had just been lifted).

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allegations regarding the amount and percentage of the stock sold by Tracinda tend to support the element of scienter.

b. The Timing of the Sales

Plaintiff alleges that Tracinda sold its first million share block of DCX stock less than one month after receiving the inside information, and that within four months, it had sold over 7.5 million of its shares. These sales were completed before the information regarding declining cash flow went public on July 29, 1999, at which time the stock declined in value 8.8%. Plaintiff alleges that by selling its stock before July 29, 1999, Tracinda saved over $120 million. (Compl. ¶ 35).

The parties argue over whether a trading bar was lifted only three weeks before Tracinda started selling its shares. Plaintiff contends Tracinda could have sold approximately four million of its shares

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If the Court were to consider only the percentage of Tracinda's DCX stock that was sold, less than 18%, these cases tend to support Defendants' position. However, the Court considers the amount and percentage of the shares sold, and notes that there is no indication that any of the above-cited cases involved amounts—in terms of shares sold or proceeds received—nearing the over 7.5 million shares or over $660 million in proceeds at issue in the current action.

notwithstanding the partial bar; Defendants maintain the bar precluded them and other "affiliates" of DCX from selling, collectively, greater than 1% of DCX's stock—a far more restrictive bar. The Court cannot resolve this issue at the pleadings stage. In any event, even assuming Defendants' version is correct, the fortuitous timing of Tracinda's stock sales remain suspect.[11] Plaintiff's allegations regarding the timing of the stock sales by Tracinda tend to support the element of scienter.

c. Prior Trading History

Plaintiff also asserts that Tracinda began to sell large blocks of DCX stock for the first time in June 1999. However, Defendants correctly point out that DCX stock had not long been in existence, because it was created by a merger that occurred in November 1998. Tracinda's trading history of the DCX stock predecessor, Chrysler stock, would be relevant to this inquiry. The Complaint alleges that Tracinda was at one time Chrysler's largest shareholder

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[11] It is clear that courts should consider how the three factors regarding suspicious trading may be interrelated. For instance, in *In re Silicon Graphics*, the Ninth Circuit considered the amount and percentage of stock sold in context, and that context included consideration of the timing of the sale. 183 F.3d at 987-88 . There, the Court considered the fact that a restriction on trading had just been lifted as to stock acquired by an insider as consideration for the sale of his business. *Id.*

(owning 14% of its stock) and that Tracinda agreed in 1996 not to purchase additional shares of Chrysler in exchange for a seat on the Board of Directors. (Compl.¶ 16.) Nevertheless, the Complaint does not make allegations regarding Tracinda's sales of Chrysler's stock. Such information would be relevant to Tracinda's prior trading history.[12]

For the reasons set forth above, Plaintiff has alleged facts that state with particularity facts gave rise to a strong inference of wrongdoing.

2. Materiality

a. Reliance by Investors

In *Caravan*, the Ninth Circuit stated that the objective test for materiality was "whether there is a substantial likelihood that a reasonable investor would consider the fact important in making an investment decision." *Caravan*, 769 F.2d at 565 (internal citations and quotation marks omitted). The court continued by stating that materiality is a question of fact unless reasonable minds could not differ on the materiality of the withheld information. *Id.* (citing *TSC Industries, Inc. v.*

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[12] At oral argument, Plaintiff's counsel made general references to Tracinda's lack of sales of Chrysler stock in the months leading up to the DaimlerChrysler merger. Plaintiff may amend the Complaint to add these allegations.

Northway, Inc., 426 U.S. 438, 450, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976)).

Plaintiff argues that information contained in the Report which Defendants had in their possession, showing a significant drop in "free cash flow" in 1999 when compared to 1998 as well as a projected " 'significant' free cash flow decline before net new business" and an "overall 'significant' free cash flow decline," was material. Defendants contend that Plaintiff selectively quoted material from the Report, and that Plaintiff's quoted information is not significant when taken in context of the Report in its entirety. However, materiality is not, as Defendant Aljian suggests, merely a question of whether the Report "paints a positive or negative picture of DaimlerChrysler"; but whether a reasonable investor would consider the information contained therein in making an investment decision.

The Ninth Circuit acknowledges that investors are concerned, perhaps above all, with the cash flows of the companies in which they invest. *United States v. Smith*, 155 F.3d 1051, 1064 n. 20 (9th Cir. 1998). Therefore, it is substantially likely that a reasonable investor would consider the "significant" decline in "free cash flow" important, notwithstanding the rest of the information contained in the Report, in making an investment decision.

Moreover, as noted in *Employer-Teamster Joint Council Pension Trust Fund v. America West*

Holding Corp., 320 F.3d 920, 935 (9th Cir. 2003), when disclosure of information actually leads to a reduction in share value, it is likely that a reasonable investor would find that information material. Here, Plaintiff alleges that when a significant reduction in cash flow (2.1 billion Euro) was disclosed on July 29, 1999, DCX stock lost 8.8% of its value. Such actual reduction in share value lends support to the position that the information was material.

b. Forward-Looking Statements

Defendants next argue that future projections are not "actual facts" and are therefore not "material" as a matter of law. Defendants cite a number of cases in support of its argument but, ultimately, a case not cited by Defendants resolves this issue.

In *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998), *cert. denied*, 525 U.S. 1071, 119 S.Ct. 804, 142 L.Ed.2d 664 (1999), the Ninth Circuit addressed whether the materiality element of insider trading could be met with what it referred to as "soft" information, i.e., financial projections. *Id.* at 1064. The Ninth Circuit recognized that the difference between "soft" information and "hard" facts is not always clear. *Id.* at n. 22. The court explicitly rejected an argument that "soft" information was immaterial as a matter of law. *Id.* at 1065. Instead, the court held that the determination of materiality was a fact-intensive inquiry that must be made on a case-by-case basis.

Id. at 1066. The court noted that with respect to projections, "materiality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'" *Id.* at 1065 (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 238, 108 S.Ct. 978, 987, 99 L.Ed.2d 194 (1988)).

In the end, the Court is persuaded by Plaintiff's argument that because DaimlerChrysler itself regarded the multi-billion dollar decline in free cash flow as "significant," it is likely that an investor in DCX stock would also find this information important. Certainly, at this stage of the proceedings, the Court cannot say that, as a matter of law, the information is not material.

For these reasons, the Court finds that Plaintiff has sufficiently pleaded the materiality element of insider trading.

3. Failure to Disclose

Plaintiff alleges that while in possession of material, nonpublic information, Defendants sold over 7.6 million shares of DCX. (Compl. ¶¶ 5-6). This meets the "failure to disclose" element of insider trading.

Defendants argue that no liability should be based on sales made after April 28, 1999,[13] the date of DaimerChrysler's Form 6-K filing. Defendants contend that the information from the Form K-6 filing was sufficient to supply both Plaintiff and the market with all the facts necessary to conclude that DCX's free cash flow was declining. However, the information released in Form 6-K reflected only the actual free cash flow loss of the previous quarter, and not the earlier projected loss, i.e., the information to which Defendants were privy while making the trades alleged herein. Therefore, it cannot be determined as a matter of law that because DaimlerChrysler released this Form 6-K on April 28, 1999, Defendants satisfied their duty to disclose for the five DCX stock trades made after that date.

4. Trading

Plaintiff alleges that Defendants traded a total of 7,642,241 shares on nine separate occasions from March 19, 1999 through June 11, 1999, while in possession of the material nonpublic information contained in the Report. This meets the fourth *Caravan* element which requires a purchase or sale of securities.

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[13] Tracinda sold four million shares of DCX before this date; the remainder of the sales occurred after this date.

V. Tipper/Tippee Liability

Only Aljian is alleged to be an insider. Therefore, Kerkorian and Tracinda are liable, if at all, under the "tippee" theory of liability.

"Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they may not give such information to an outsider [i.e., the 'tippee'] for the same improper purpose of exploiting the information for their personal gain." *Dirks*, 463 U.S. at 659, 103 S.Ct. at 3264; *see* 15 U.S.C. § 78t(b) (making it unlawful to do indirectly "by means of any other person" any act made unlawful by the federal securities laws). The "tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee, and the tippee knows or should know that there has been a breach." *Id.* at 660, 103 S.Ct. 3255.

Plaintiff alleges that Defendant Aljian is an insider of DCX by virtue of his position as a member of DCX's Shareholders Committee,[14] the corporation in whose shares he trades, and that he therefore

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[14] Plaintiff alleges also that previous to Chrysler Corporation's merger with Daimler-Benz, AG, resulting in the formation of DCX, Aljian was a Director of Chrysler.

owes a fiduciary duty to DCX's shareholders. Plaintiff also alleges that Defendants Kerkorian and Tracinda are "tippees" who received material nonpublic information from Aljian, and knew or should have known Aljian breached a fiduciary duty when he placed the Report in Tracinda's files.

Plaintiff has sufficiently alleged that Aljian was a tipper, and that Tracinda and Kerkorian were tippees who may be subject to liability.

VI. Pleading Causation Under § 20A

Under the PSLRA, Plaintiff has the burden of "proving that the act or omission of the defendant ... caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). However, the PSLRA did not change traditional pleading rules with respect to causation. *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 830 n. 3 (8th Cir. 2003); *Coates v. Heartland Wireless Communications, Inc.*, 26 F.Supp.2d 910, 923 (N.D.Tex. 1998). The Ninth Circuit set forth two components of the causation requirement under Rule 10b-5: Plaintiff must prove (1) that the violations in question caused Plaintiff to engage in his transaction ("transaction causation"), and (2) that the misrepresentations or omissions caused Plaintiff harm ("loss causation"). *McGonigle v. Combs*, 968 F.2d 810, 820 (9th Cir. 1992) (internal citations and quotation marks omitted); *accord Gray v. First Winthrop Corp.*, 82 F.3d 877, 886 (9th Cir. 1996).

Plaintiff alleges the DCX stock prices were artificially inflated as a result of Defendants trading on the material nonpublic information in their possession. Plaintiff alleges that he contemporaneously acquired DCX stock, without the benefit of the information in the possession of Defendants, and was damaged thereby because he paid artificially inflated prices for the stock. Lending support to Plaintiff's position is his allegation that, upon news of DCX's free cash flow in the Form 6-K quarterly report made public on July 29, 1999, DCX shares closed down 8.8% from the previous trading day. Plaintiff alleges he would not have purchased the DCX stock if he was aware of this artificial inflation. Plaintiff's allegations satisfy the causation pleading requirement for insider trading.

VII. Conclusion

Defendants' Motions to Dismiss (docket # 18, 20) are **hereby granted in part and denied in part**. The Court **dismisses with prejudice** the first and second causes of action, but denies the Motions to Dismiss as to the third cause of action.

APPENDIX C
Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Petition for Rehearing En Banc (filed August 9, 2007)

DONALD JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-APPELLEE,
V.
JAMES D. ALJIAN; KIRK KERKORIAN; TRACINDA CORPORATION,
DEFENDANTS-APPELLANTS

NO. 04-56997

D.C. NO. CV-03-05986-FMC
CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES

ORDER

BEFORE: O'SCANNLAIN, KLEINFELD, AND M. SMITH, CIRCUIT JUDGES.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX D
Exchange Act § 20A; 15 U.S.C. § 78t-1

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§ 78t-1. Liability to contemporaneous traders for insider trading

(a) Private rights of action based on contemporaneous trading. Any person who violates any provision of this title or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

(b) Limitations on liability.

(1) Contemporaneous trading actions limited to profit gained or loss avoided. The total amount of damages imposed under subsection (a) shall not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation.

(2) Offsetting disgorgements against liability. The total amount of damages imposed against any person under subsection (a) shall be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a

proceeding brought under section 21(d) of this title relating to the same transaction or transactions.

(3) Controlling person liability. No person shall be liable under this section solely by reason of employing another person who is liable under this section, but the liability of a controlling person under this section shall be subject to section 20(a) of this title.

(4) Statute of limitations. No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.

(c) Joint and several liability for communicating. Any person who violates any provision of this title or the rules or regulations thereunder by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) with, and to the same extent as, any person or persons liable under subsection (a) to whom the communication was directed.

(d) Authority not to restrict other express or implied rights of action. Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this title or the availability of any cause of action implied from a provision of this title.

(e) Provisions not to affect public prosecutions. This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this title, nor shall it bar or limit in any manner any

action to recover penalties, or to seek any other order regarding penalties.